

## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own ) RULE AND REGULATION NO. 161  
motion, seeking to amend Title 291, Chapter 1, )  
Rules of Commission Procedure, to rewrite a )  
substantial portion of the rules; correct )  
technical errors, grammar, punctuation, )  
spelling, sequential numbering and the like; )  
and reprint the chapter in its entirety. )

### **COMMENTS OF THE NEBRASKA NATURAL GAS ASSOCIATION**

By its Order entered August 31, 2004, the Nebraska Public Service Commission (the “Commission”) requested comments on amendments to Nebraska Administrative Code, Title 291, Chapter 1, Rules of Commission Procedure and proposed to rewrite a substantial portion of the rules, correct technical errors, grammar, punctuation, spelling, sequential numbering and the like, and to reprint the chapter in its entirety.

The Commission’s notice with regard to the adoption of the proposed rules and regulations contained in Appendix A of the Commission’s August 31, 2004 Order stated that comments will be received by the Commission until October 15, 2004, after which a public hearing will be held on the amendments.

The Nebraska Natural Gas Association (the “Association”), a nonprofit Nebraska corporation whose members include Kinder Morgan, Inc. (“Kinder Morgan”), Aquila, Inc. d/b/a Aquila Networks (“Aquila”), and NorthWestern Corporation d/b/a NorthWestern Energy (“NorthWestern”) herewith provides its comments reflecting common interests of its members, which comments are applicable only to the proposed rules which the Commission has issued for comment. Individual member companies reserve their right to file comments with the Commission with regard to issues specific to their systems and customers. In addition, as this

rulemaking proceeds, individual members reserve all rights to alter their individual position from that set forth by the Association's comments filed herewith.

## **I. INTRODUCTION AND GENERAL COMMENTS**

The Association welcomes the opportunity to assist the Commission in developing rules and regulations pertaining to the Commission's procedures as those procedures relate to service of natural gas utilities subject to the Commission's jurisdiction ("Jurisdictional Utilities") under the State Natural Gas Regulation Act, Neb. Rev. Stat. §§ 66-1801, *et. seq.* (LB790, 2003) (the "Act"). The Association supports the Commission's effort to adopt rules related to the Commission's Rules of Procedure. To that end, the Association has some general comments regarding the procedures to be adopted for Jurisdictional Utilities, along with some specific language changes. Finally, the Association plans to participate in the Commission's hearings on these proposed rules and reserves its right, and the right of individual members of the Association, to supplement these comments at such time, particularly with regard to making reply statements to any comments received by other parties in this docket.

One of the Association's principal concerns is whether procedural or substantive due process rights of Jurisdictional Utilities could be violated if the proposed rule amendments and the Act are not properly applied. The area of greatest concern for the Association relates to the treatment of evidence presented to the Commission during rate proceedings or Commission-ordered investigations. While the Rules of Evidence of the State of Nebraska are to apply generally, the Commission's amended rules allow it to be selective in the application of those rules. While this is not unreasonable on its face, the application of the proposed rule could lead to unintended or unfair treatment of a Jurisdictional Utility or another party to a proceeding. Another concern of the Association is the scope of "participation" by Commission consultants or

Staff during rate and other proceedings involving extensive “trials” or “hearings.” The Act specifically provides that the Public Advocate is to serve as the “trial” staff for the Commission in proceedings under the Act. The Association has provided more specific comments and suggestions to address these issues below.

## **I. SPECIFIC COMMENTS ON PROPOSED RULES**

The following comments present a rule-by-rule analysis of the proposed rules.

### **001 - GENERAL**

#### **Commission’s Proposed Rule**

001.01J Jurisdictional Utility: A natural gas public utility subject to the jurisdiction of the Commission.

#### **Association’s Proposed Rule**

001.01J Jurisdictional Utility: A natural gas public utility subject to the jurisdiction of the Commission under the State Natural Gas Regulation Act.

**Rule 001.** This rule sets forth definitions.

**Comment.** Rule 001.01J defines, “Jurisdictional Utility” as “a natural gas public utility subject to the jurisdiction of the Commission.” The Association would add, “under the State Natural Gas Regulation Act” to that definition so that it is clear that this definition is identical to that within the Act.

#### **Commission’s Proposed Rule**

001.01M2 Commenter: A person filing written comments in a proceeding.

Rule 001.01M defines parties to Commission proceedings. The new Rule 001.01M2 provides that a person filing written comments in a proceeding is a Commenter.

**Comment.** While the Association does not take issue with the definition, it does recommend that the Commission further define when and how comments can be made. In the context of a contested case proceeding, a Commenter should not be permitted unless those

comments are in accordance with any procedural schedule adopted after a Planning Conference held pursuant to Commission Rule 017. The Association believes that the Commission should further define Commenter to be one who files comments in a rulemaking or other administrative procedure proceeding as opposed to rate, investigative or other substantive proceedings. The Association believes that in contested case proceedings, parties should be required to take advantage of the Commission's formal and informal intervention rules, as opposed to submitting comments.

## **002 APPEARANCES**

### **Commission's Proposed Rule**

002.04 Staff: Nothing in this chapter will prohibit staff members of the Commission, whether or not admitted to practice law in Nebraska, from interrogating witnesses or otherwise participating in proceedings before the Commission.

### **Association's Proposed Rule – 002.04**

002.04 Staff: Nothing in this chapter will prohibit staff members of the Commission, whether or not admitted to practice law in Nebraska, from participating in proceedings before the Commission; however, in evidentiary matter proceedings under the State Natural Gas Regulation Act, the Public Advocate will serve as trial staff before the Commission and shall have the right to interrogate witnesses and present testimony. Nothing in this chapter will prohibit staff members of the Commission from observing or clarifying testimony or discovery presented in proceedings before the Commission.

**Comment:** The Association is concerned that the Commission's Proposed Rule is too broad when applied to contested case proceedings under the Act. As noted in the Association's proposed rule language above, the Public Advocate as defined in proposed Commission Rule 001.010 is the person appointed by the Executive Director to represent the interest of Nebraska citizens in all classes of Jurisdictional Utility ratepayers, other than high-volume ratepayers, in matters involving those Jurisdictional Utilities and as trial staff before the Commission. This is consistent with the provision of Section 30 of the Act (codified at Neb. Rev. Stat. § 66-1830).

To the extent that Rule 002.04 (an existing Rule) permits the Commission Staff to participate in proceedings, the Association proposes that, because the Act has created a separate position (the Public Advocate) to act as trial staff and represent the interests of ratepayers, the Rule should be amended to limit the participation of Commission Staff members or consultants. Without such limitations, neither a Jurisdictional Utility nor the Public Advocate will have the right to cross-exam or interrogate such evidence or argument. The Commission, its advisory staff, and its consultants should participate in a role of receiving the evidence and to ask questions for clarification regarding testimony presented.

### **003 TYPES OF PROCEEDINGS**

**Comment:** The Act is contained in Chapter 66 of the Nebraska Revised Statutes. The Association recommends adding Chapter 66 to the list of Chapters noted in Rule 003.01 for initial pleadings. Further, in subpart (4) of Rule 003.01, the text should be revised to delete the reference to “or entity” as Rule 001.01N defines “person” to include various types of “entities.”

**Rule 003.01(4):** A formal complaint, which may be filed by any person ~~or entity~~ against any person subject to the jurisdiction of the Commission.

### **011 SERVICE AND NOTICE**

**Comment:** Rule 11 of the Commission’s Rules and Regulations related with its procedures deals with “service and notice,” and Rule 11.01 states that it applies to “each person subject to the Commission’s jurisdiction.” However, in Rule 11.02, which sets forth the procedures required for the Commission’s acceptable “methods of service,” it states that such rule applies to “certificated carriers” but does state similar application to Jurisdiction Utilities. The Association is confused as to how Rule 11 applies to Jurisdictional Utilities, and whether the

definition should be expanded to include others or to otherwise clarify what applies to all parties under the Commission's jurisdiction versus "certificated carriers" as noted in Rule 11.02C.

### **013 SHOW CAUSE ORDERS**

***Comment:*** Rule 13 addresses procedures under show cause orders. The main addition here was to provide additional language regarding the Commission's authority to assess a civil penalty for prescribed violations of the Commission's regulations. While the Association does not take specific challenge to the additional language, it does want to assert that any civil penalties that may be assessed against Jurisdictional Utilities, based upon provisions of the Act, must be consistent with the civil penalties allowed under the Act or under some other applicable authority granted to the Commission.

### **015 INTERVENTION IN PROCEEDINGS**

***Comment:*** Rule 15 addresses interventions in proceedings. The Association supports Rule 15.01 as amended. The Association members are concerned that its rate cases or other proceedings before the Commission could become potentially unmanageable if the Commission does not assert control over the process of procedure for intervening. Regarding Rule 15.03, the Commission notes that statements may be made by the public. The Association recommends that if a person, unrepresented by counsel, is allowed to make a statement at a proceeding, the parties should be entitled to cross-examination of that person. Otherwise, while such statements may be helpful or useful, the parties should be given the opportunity to cross-examine for bias, accuracy, or competency of the witness, as well as the factual basis for the statement presented. To the extent that such information would be allowed to be made a part of the record of a proceeding without such opportunity, it could not only allow the presentation of unverified, unreliable and/or inaccurate information, it could also be a violation of the rights of the parties to

the proceeding Thus, the Association recommends adding a provision to the public statement section of the proposed Rule that such statements may be collected and the parties to a proceeding will have an opportunity to cross-examine the person making the statement and to otherwise provide evidence to support or rebut those statements. In addition, statements to be made by the public should be filed to the extent possible, at a time preceding the hearing so as to provide an opportunity of the parties to adequately prepare to respond to those statements.

## **017 PLANNING CONFERENCE**

### **Commission's Proposed Rule**

017.03 Objection to the Order: Subsequent Proceedings: If a Planning Conference order is entered, a reasonable time will be allowed for the parties to represent objections on the grounds that it does not fully or correctly embody the agreements reached at the conference. Thereafter, the terms of the order or modification thereof shall determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

### **Association's Proposed Rule**

017.03 Objection to the Order: Subsequent Proceedings: If a Planning Conference order is entered, a reasonable time will be allowed for the parties to represent objections on the grounds that it does not fully or correctly embody the agreements reached at the conference or to make other argument where unresolved dispute exists. Thereafter, the terms of the order or modification thereof shall determine the subsequent course of the proceedings, unless for good cause shown modified to prevent manifest injustice.

**Comment:** Rule 17 addresses planning conferences. While the Association agrees with the addition of a Rule establishing the procedures for adopting a progression schedule and establishing a hearing date or addressing other matters, it notes that Rule 17.03 should be expanded to allow for the parties to present arguments or other changes to a progression order where unresolved disputes may continue.

For example, Rule 17.03 does provide an opportunity for objections on the grounds it does not fully or correctly embody the agreements reached at the conference, but does not state

that arguments would be permitted where no agreement was reached on a particular issue at the planning conference. The Association recommends that the Commission's rule be expanded to provide for this event. Additionally, the standard for modification of the procedural schedule should be based upon a showing of good cause.

## **018 EVIDENCE**

### **Commission Proposed Rule**

**018.08 Prepared Testimony:** Testimony of a witness may be adduced by use of a prepared statement or prefiled testimony if the witness is present for cross-examination at the hearing.

### **Association's Proposed Rule**

**018.08 Prepared Testimony:** Testimony of a witness may be adduced by use of a prepared statement or prefiled testimony if the witness is present for cross-examination at the hearing or cross-examination is waived by the parties.

**Comment:** Rule 18 addresses evidentiary procedural issues. In its preliminary comments, the Association discussed some its concerns about the presentation of evidentiary record made before the Commission in contested cases (principally rate applications and investigations). The Association supports the change to Rule 18.01 that "no factual information or evidence other than that in the record shall be considered in the determination of a case." The broad language in proposed Rules 18.01A, 18.01B, 18.01C, 18.01D, 18.01E, 18.01F, 18.01G, and 18.01H does give the Commission significant flexibility in conducting its proceedings, and the Association does not oppose the Commission setting forth language to acknowledge its ability to conduct hearings and to prosecute investigations. The Association does have a concern, discussed above, that the Commission's Staff and advisors may take a more active role in proceedings, rather than rely on the Public Advocate to serve as trial staff. For example, the Association believes that the Commission Staff and advisors should not be propounding data requests, presenting testimony or other evidence, or otherwise actively prosecuting rate cases or



investigations. Rule 18.05 deals with official files and provides that the Commission, on its own motion, may offer and make part of the record in any proceeding before it, all records and documents in the Commission's possession of which the Commission desires to avail itself. In the context of a rate case, those documents may include answers to discovery, which neither the Jurisdictional Utility itself nor the Public Advocate has offered or sponsored through one of its witnesses. If the Commission subsequently offers the discovery response on its own motion, that action may deprive the parties of a due process right to examine the validity, the veracity, or the competency of that documentation. Under Rule 18.08, which deals with prepared testimony, the Association agrees with the addition of prefiled testimony to be filed by a witness. However, there may be instances where the witness is not present for cross-examination because the parties have waived their right to cross-examination and the hearing is nevertheless admitted upon stipulation. Thus, Rule 18.08 should add a provision for the witness's testimony to be filed in the event that cross-examination is waived and not require the presence of that witness.

Rule 18.12 deals with depositions and discovery. The Association is concerned that the rules of discovery permit the Commission to establish response times to data requests without prescribing a minimum or adding notions of reasonableness to that time period. For example, the Nebraska Rules of Evidence provide for a period of up to thirty (30) days to respond. In some cases,, it may be appropriate for shorter periods in which to respond; however, some data may take longer than that prescribed. Therefore, the Association recommends adding language to Rule 18.12 to note that exceptions will be permitted without civil penalties where the information reasonably cannot be provided within the time period stated. Moreover, the shortened period should not be less than seven (7) days in which a utility should have to respond in a rate case.

The Association reserves its rights to comment on the comments of others in this proceeding.

Dated this 15th day of October, 2004.

Respectfully submitted,

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